

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

Case No. CV-14-03151-JPH

## **BARBARA L. BRALEY.**

Plaintiff,

VS.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT**

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No.

14, 15. Attorney David M. Church represents plaintiff (Braley). Special Assistant  
United States Attorney Catherine Escobar represents defendant (Commissioner).  
The parties consented to proceed before a magistrate judge. ECF No. 6. After  
reviewing the administrative record and the briefs filed by the parties, the court

## ORDER

1 grants plaintiff's motion for summary judgment, ECF No. 14.

2 **JURISDICTION**

3 Braley applied for disability insurance benefits (DIB) and supplemental  
4 security income disability benefits (SSI) on November 9, 2010, alleging onset  
5 beginning March 6, 2007 (Tr. 158-175). The claims were denied initially and on  
6 reconsideration (Tr. 94-100, 106-116). Administrative Law Judge (ALJ) Timothy  
7 Mangrum held a hearing July 16, 2012. Braley, represented by counsel, and a  
8 vocational expert testified (Tr. 28-49). On February 14, 2013, the ALJ issued an  
9 unfavorable decision (Tr. 12-21). The Appeals Council denied review August 20,  
10 2014, making the ALJ's decision final (Tr. 1-5). On October 10, 2014 Braley filed  
11 this appeal pursuant to 42 U.S.C. §§ 405(g). ECF No. 1, 4.

12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing transcript, the  
14 ALJ's decision and the parties' briefs. They are only briefly summarized here and  
15 throughout this order as necessary to explain the Court's decision.

16 Braley was 38 years old at onset and 44 at the time of the ALJ's decision. She  
17 has a tenth grade education. She has worked as a traffic flagger, sales clerk and  
18 bartender. She cleans, with help, cooks, drives and shops. She is unable to stand  
19 longer than 30-45 minutes because of back pain. Braley is unable to use her left hand  
20 due to pain and numbness. She is right handed (Tr. 33-40, 44, 194).

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## SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the Act) defines disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff’s age, education and work experiences, engage in any other substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404. 1520(a)(4)(i), 416.920(a)(4)(i). If not, the decision maker proceeds to step two, which determines whether plaintiff has a medially severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If plaintiff does not have a severe impairment or combination of impairments,

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1 the disability claim is denied. If the impairment is severe, the evaluation proceeds to  
2 the third step, which compares plaintiff's impairment with a number of listed  
3 impairments acknowledged by the Commissioner to be so severe as to preclude  
4 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20  
5 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
6 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is  
7 not one conclusively presumed to be disabling, the evaluation proceeds to the fourth  
8 step, which determines whether the impairment prevents plaintiff from performing  
9 work which was performed in the past. If a plaintiff is able to perform previous work  
10 that plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),  
11 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) is  
12 considered. If plaintiff cannot perform past relevant work, the fifth and final step in  
13 the process determines whether plaintiff is able to perform other work in the national  
14 economy in view of plaintiff's residual functional capacity, age, education and past  
15 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*  
16 *Yuckert*, 482 U.S. 137 (1987).

17 The initial burden of proof rests upon plaintiff to establish a *prima facie* case  
18 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
19 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
20 met once plaintiff establishes that a mental or physical impairment prevents the

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1 performance of previous work. The burden then shifts, at step five, to the  
 2 Commissioner to show that (1) plaintiff can perform other substantial gainful  
 3 activity and (2) a “significant number of jobs exist in the national economy” which  
 4 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

## 5 **STANDARD OF REVIEW**

6 Congress has provided a limited scope of judicial review of a Commissioner’s  
 7 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner’s decision,  
 8 made through an ALJ, when the determination is not based on legal error and is  
 9 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir.  
 10 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). “The [Commissioner’s]  
 11 determination that a plaintiff is not disabled will be upheld if the findings of fact are  
 12 supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir.  
 13 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,  
 14 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9<sup>th</sup> Cir. 1975), but less than a  
 15 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989).  
 16 Substantial evidence “means such evidence as a reasonable mind might accept as  
 17 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401  
 18 (1971)(citations omitted). “[S]uch inferences and conclusions as the [Commissioner]  
 19 may reasonably draw from the evidence” will also be upheld. *Mark v. Celebreeze*,  
 20 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a

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1 whole, not just the evidence supporting the decision of the Commissioner. *Weetman*  
 2 *v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,  
 3 526 (9<sup>th</sup> Cir. 1980)).

4 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence.  
 5 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
 6 interpretation, the Court may not substitute its judgment for that of the  
 7 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
 8 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
 9 set aside if the proper legal standards were not applied in weighing the evidence and  
 10 making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d  
 11 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the  
 12 administrative findings, or if there is conflicting evidence that will support a finding  
 13 of either disability or nondisability, the finding of the Commissioner is conclusive.  
 14 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

## 15                   **ALJ'S FINDINGS**

16                   ALJ Mangrum found Braley has been insured for DIB purposes through  
 17 September 30, 2010 (Tr. 12, 14).

18                   The ALJ found at step one that Braley worked at SGA levels after onset (Tr.  
 19 14, 184-91), but there has been a period of at least twelve continuous months when  
 20 she did not engage in SGA (Tr. 15). At steps two and three, he found Braley suffers

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1 from mild degenerative disc disorder, an impairment that is severe but does not meet  
2 or medically equal a Listed impairment (Tr. 15). The ALJ found Braley less than  
3 credible. He assessed a residual functional capacity (RFC) for a range of light work  
4 (Tr. 15-16). At step four, the ALJ found Braley is able to perform her past relevant  
5 work as a flagger, sales clerk and bartender (Tr. 18). Alternatively, at step five, the  
6 ALJ found Braley can perform other jobs, such as cashier, cleaner/housekeeper and  
7 production assembler (Tr. 19-20). Accordingly, the ALJ found Braley is not disabled  
8 as defined by the Act (Tr. 20).

## 9 ISSUES

10 Braley alleges the ALJ erred when evaluating the evidence and credibility,  
11 and at steps four and five. ECF No. 14 at 4-19. The Commissioner responds that the  
12 ALJ's findings are factually supported and free of harmful legal error. She asks the  
13 court to affirm. ECF No. 15 at 2.

## 14 DISCUSSION

### 15 A. *Credibility*

16 Braley alleges the ALJ's credibility assessment is not properly supported.  
17 ECF No. 14 at 12-16. The Commissioner answers that the ALJ's reasons suffice  
18 under any standard of review. ECF No. 15 at 10.

19 When presented with conflicting medical opinions, the ALJ must determine  
20 credibility and resolve the conflict. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d

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1 1190, 1195 (9<sup>th</sup> Cir. 2004)(citation omitted). The ALJ's credibility findings must be  
2 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup>  
3 Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for  
4 rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*,  
5 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings are insufficient: rather the ALJ  
6 must identify what testimony is not credible and what evidence undermines the  
7 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918  
8 (9<sup>th</sup> Cir. 1993).

9 The ALJ's reasons are not fully supported.

10 The ALJ notes work and other activities suggest greater functional capacity  
11 than Braley has described. He points out she performed household chores, drove  
12 herself, shopped, cared for her dog, rode her horse and worked – all after onset (Tr.  
13 16-17, 216-220, 367, 413-14). It may have been reasonable to conclude these  
14 activities are inconsistent with the degree of limitation alleged, *see e.g.*, *Rollins v.*  
15 *Massanari*, 261 F.3d 853, 857 (9<sup>th</sup> Cir. 2001), but the evidence shows these activities  
16 changed as Braley's condition appeared to worsen. *See e.g.*, Tr. 413 (riding her horse  
17 in November 2011 gave "her a lot of grief").

18 The ALJ errs when he states medical evidence showed Braley's condition did  
19 not significantly worsen during the relevant period. It appears her condition did in  
20 fact worsen.

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1       The ALJ is correct that in March 2007 objective findings were mild. At the  
2 same time a provider noted Braley was not wearing a cervical collar as prescribed  
3 and an MRI did not provide any basis for her complaints. A March 2007 MRI  
4 indicates degenerative changes were minimal to mild. A diffuse disc bulge and mild  
5 foraminal narrowing are noted . By May 2007, Braley said she had been helped by  
6 physical therapy and was working full time. She was able to lift heavy barrels (Tr.  
7 17, 317, 319, 330-31, ).

8       She suffered a knee injury on the job in 2008 (Tr. 17, 325). The ALJ is also  
9 correct that in October 2010 treating doctor Richard Edgerly, M.D., opined she was  
10 able to return to work. A November 2011 neurosurgeon's exam revealed normal  
11 strength in all extremities, and all neurological tests were normal. (Tr. 17, 286, 393-  
12 94).

13       However, in December 2011 Gus Varnavas, M.D., reviewed more recent test  
14 results. He notes a herniated disc is causing radiculopathy (Tr. 417). Dr. Varnavas  
15 indicates nonsurgical treatments failed and opined Braley should undergo a simple  
16 anterior cervical discectomy and fusion to correct her spinal problems (Tr. 409-  
17 419). The ALJ does not mention a July 2010 MRI or this opinion.

18       There are two remedies when the ALJ fails to provide adequate reasons for  
19 rejecting the uncontradicted opinion of a treating or examining doctor. The general  
20 rule, found in the *Lester* line of cases is that “we credit that opinion as a matter of

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1 law.” *Lester v. Chater*, 81 F.3d 821, 843 (9<sup>th</sup> Cir. 1995 ); *Pitzer v. Sullivan*, 908 F.2d  
 2 502, 506 (9<sup>th</sup> Cir. 1990); *Hammock v. Bowen*, 879 F.2d 498, 502 (9<sup>th</sup> Cir. 1989).  
 3 Under the alternate approach found in *McAllister v. Sullivan*, 888 F.2d 599, 603 (9<sup>th</sup>  
 4 Cir. 19891), a court may remand to allow the ALJ to provide the requisite specific  
 5 and legitimate reasons for disregarding the opinion. *See also Benecke v. Barnhart*,  
 6 379 F.3d 587, 594 (9<sup>th</sup> Cir. 2004)(court has flexibility in crediting testimony if  
 7 substantial questions remain as to a claimant’s credibility and other issues). Where  
 8 evidence has been identified that may be a basis for a finding, but the findings are  
 9 not articulated, remand is the proper disposition. *Salvador v. Sullivan*, 917 F.2d 13,  
 10 15 (9<sup>th</sup> Cir. 1990)(citing *McAllister*); *Gonzales v. Sullivan*, 914 F.2d 1197, 1202 (9<sup>th</sup>  
 11 Cir. 1990).

12       The ALJ’s credibility assessment is unsupported by the evidence because  
 13 objective evidence shows Braley’s condition worsened and conservative treatment  
 14 ultimately failed, consistent with Braley’s complaints. The ALJ failed to discuss  
 15 these records. The error is harmful.

16       ***B. Medical evidence***

17       Braley alleges the ALJ should have found mental impairments severe at step  
 18 two. ECF No. 14 at 4-9; 16 at 2-5. The Commissioner responds that error if any was  
 19 harmless. ECF No. 15 at 5-9.

20       Because the case must be remanded for a new credibility assessment and

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1 consideration of Dr. Varnavas' opinion, on remand the ALJ must consider the  
2 opinions of Drs. Forsyth and Pierce, and indicate the reasons for the weight given  
3 the opinions. In addition, the updated opinion of Dr. Edgerly, unavailable to the ALJ  
4 but considered by the Appeals Council, should also be considered. It may be helpful  
5 to obtain the assistance of a medical and/or psychological expert.

6       *C. Mental RFC and step five*

7       Braley alleges the ALJ's residual functional capacity assessment is in error  
8 because he failed to include limitations assessed by Dr. Forsyth. ECF No. 14 at 4-9,  
9 ECF No. 16 at 8. As noted, the opinions of Drs. Forsyth and Pierce, and Dr.  
10 Edgerly's updated opinion, must be considered on remand.

11       The Court is unable to determine on this record the date of onset and whether  
12 Braley suffered severe limitations lasting the requisite twelve months. On remand  
13 the ALJ will make this determination.

14       The ALJ is responsible for reviewing the evidence and resolving conflicts or  
15 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It  
16 is the role of the trier of fact, not this court, to resolve conflicts in evidence.  
17 *Richardson*, 402 U.S. at 400. The Court expresses no opinion as to what the ultimate  
18 outcome on remand will or should be.

19       The ALJ's determinations are not supported by the record and contain harmful  
20 legal error.

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## CONCLUSION

After review the Court finds the ALJ's decision is not supported by substantial evidence and contains harmful legal error.

**IT IS ORDERED:**

1. Plaintiff's motion for summary judgment, ECF No. 14, is granted.
  2. Defendant's motion for summary judgment, ECF No. 15, is denied.
  3. The case is reversed and remanded pursuant to U.S.C § , sentence four.

The District Court Executive is directed to file this Order, provide copies to counsel, enter judgment in favor of Plaintiff and **CLOSE** the file.

DATED this 24th day of June, 2015.

S/ James P. Hutton

JAMES P. HUTTON  
UNITED STATES MAGISTRATE JUDGE

## ORDER

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